Supreme Court, U.S.
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No. 94-428

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

FRED W. RISTOW and SUSAN M. RISTOW,

Petitioners,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, and THE SS UNKNOWN, an unknown ocean going ship,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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The Ristows' Petition for Certiorari and Appendix, Supplemental Brief and the Authority's Brief in Opposition and Appendix are cited throughout this Reply.

REPLY ARGUMENT

I. THE AUTHORITY'S BRIEF PRESENTS NO REASONS FOR DENYING CERTIORARI IN THIS CASE.

A. INTRODUCTION AND GENERAL REPLY

In their Petition for Certiorari, the Ristows have shown the existence of a genuine conflict, or at least an important unsettled question of federal law, concerning the important financial factor in an Eleventh Amendment analysis which clearly meets the criteria for Supreme Court review under Rule 10.1. (Petition, p.22-30) The Ristows have also outlined in summary fashion the underlying merits of their position and the error of the Fourth Circuit's decision. Under Rule 15.1, the respondent in its Brief in Opposition is charged with presenting arguments for denying

the petition and identifying perceived misstatements of fact and law.

From a review of the Ports Authority's Opposition Brief, it is apparent that the respondent has confused a respondent's brief in opposition to certiorari with a responsive brief on the merits of the case. The Authority points out perceived misstatements in the Ristows' Statement of the Case, but it then proceeds to respond primarily to the underlying merits of petitioners' case and only briefly mentions the conflict concerning the important financial factor in Section IV of its Brief. The Authority's Brief has done nothing to disprove the existence of the conflict, and its arguments fail to show why certiorari is not appropriate.

B. THE CONFLICT AND THE AUTHORITY'S RESPONSE THERETO

On pages 22 through 30 of their Petition, the Ristows have outlined the conflicting approaches utilized by the appellate courts to analyze the important financial factor. The broad approach is shown by the reasoning of the Third Circuit in Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey, 819 F. 2d 413 (3rd Cir.1987), cert. den. 484 U.S. 953, 108 S. Ct. 344, 98 L. Ed. 2d 370 (1987), which the Fourth Circuit utilized in its decision. (See App. A15-17 and Petition, p. 22-24) The Second Circuit's decision in Feeney v. Port Authority Trans-Hudson Corp., 873 F. 2d 628 (2nd Cir, 1989), aff'd on other grounds 495 U.S. 299, 110 S. Ct. 1868,

109 L. Ed. 2d 264 (1990), illustrates the actual financial analysis approach that the Ristows have relied upon throughout this litigation. (Petition, p. 25-28)

As discussed in the Ristows' Supplemental Brief, the conflict is also seen in the respective positions of the parties and amici in the pending cases of Hess v. Port Authority Trans-Hudson Corp., and Walsh v. Port Authority Trans-Hudson Corp., Supreme Court Docket No. 93-1197. (Supp. Brief, p.7-18) Not surprisingly, the Authority mentions the Ristows' Supplemental Brief only once thus trying to ignore Hess entirely.

In Section IV of its Brief, the Ports Authority claims the Ristows have tried to create the appearance of a conflict, but such conflict has been re-

solved. The Authority's arguments reflect an erroneous analysis of the situation concerning the Port Authority Trans-Hudson.

In Port Authority Trans-Hudson v. Feeney, 495 U.S. 299, 110 S. Ct. 1868, 109 L. Ed. 2d 264 (1990), the Supreme Court never resolved the conflict between the Second and Third Circuits as to the Authority's status and the underlying question regarding which analysis of the financial factor was proper for an Eleventh Amendment determination. (Petition, p. 28-29) The Court instead chose to affirm on alternative grounds finding that if the Authority was entitled to immunity the same has been expressly waived. Port Auth. Trans-Hudson, 495 U.S. at 306-309 (petition,p.29) Four Justices, in a concurring opinion, how-

ever, believed the Authority was not entitled to Eleventh Amendment immunity. Port Auth. Trans-Hudson, 495 U.S. at 309-318 (Petition, p.34-35)

While the Court probably believed its waiver decision would prevent future Eleventh Amendment litigation concerning the Authority, the determinations of the District Court for the District of New Jersey in Hess v. Port Auth. Trans-Hudson Corp, 809 F. Supp. 1172 (D.N.J. 1992) and Walsh v. Port Auth Trans-Hudson Corp., 813 F. Supp 1095 (D.N.J. 1993) have caused the issue of the Authority's status and the underlying conflict as to the financial factor to surface once again. (Supp. Brief, p. 6-7) Had the Court actually resolved the conflict as to the financial factor and the Authority's status in the 1990 Port

Auth. Trans-Hudson case, it would have been unnecessary for the Court to review Hess. (Supp. Brief, p. 6-7) The respondent either fails to understand this or conveniently chooses to ignore it. The litigation surrounding the Port Authority Trans-Hudson, together with the other cases cited by the Ristows on pages 25 through 30 of their Petition, clearly illustrates the financial factor conflict existing today in the federal judicial system.

The Authority on page 19 recites the fact that the New York/New Jersey Port Authority is a bi-state entity, while the respondent is a single state creature. Such difference is not relevant since a review of the litigation surrounding the Port Authority Trans-Hudson as well as the cases cited by the Ris-

tows on pages 18 through 30 of their Petition, particularly Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391,99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979) shows that the important financial factor has been utilized in cases involving single state and bi-state entities.

On page 20, the Authority argues that the Fourth Circuit was correct in using a broader financial approach than used by the Second Circuit in Feeney because the presumption against Eleventh Amendment immunity for interstate compact entities does not exist in this case. The Ristows believe the absence of such interstate compact presumption in this case does not justify using the broad financial approach. Furthermore, in making this statement, the Authority

has, in fact, acknowledged the very presence of the financial factor conflict.

C. REPLY CONCERNING STATEMENT OF THE CASE

In the remainder its Brief, the Authority discusses the Ristows' Statement of the Case and raises arguments concerning the underlying merits of the Ristows' position. The Ristows will first reply to those comments on the Statement of the Case that are believed to require a response. On page 2 of its Brief, the Authority claims the Ristows' description of the Authority is scanty and argumentative. Recognizing that this is a Petition and not a brief on the merits, the Ristows have adequately described the Authority on pages 3 and 4 of their Petition and have fur-

nished the Court with applicable statutory provisions concerning the Authority in Section C of their Appendix. The Ristows have stated the Authority has "highly autonomous powers" and believe the applicable statutes cited support this proposition. (Petition, p.4)

Reviewing the Authority's Statement of the Case on pages 3 through 7 of the Brief, the Ristows note the existence of numerous allegations which are unsupported by any factual reference to the record. For the Court's information, these are taken from Authority affidavits filed at the District Court level. Rather than supporting the Authority's position, these allegations show the existence of considerable autonomy and separate, segregated funds owned by the respondent.

On page 7 of its Brief, the Authority, of course, denies the Ristows' recitation of events and presents what it terms are " "technical corrections" on pages 1-4 of its Appendix. Since this case never reached the discovery stage, the Ristows' description of the incident is based on its verified complaint and the affidavit of Mr. Ristow, both of which are properly referenced. (Petition, p. 5-7) These allegations are presented to familiarize the Court with the petitioners' claim.

The Authority also claims on page 7 that the Ristows have ignored the South Carolina Tort Claims Act. The Ristows, however, have recognized the state forum for their claims, but believe the existence or non-existence of a state forum simply is not a factor in an Eleventh

Amendment analysis. (Petition, p.62-63) In its technical corrections, the Authority again denies the Ristows' description of the incident but then improperly presents an alleged version of the settlement negotiations which is not referenced and is not supported by any pleading, affidavit, or other document in the record. (Auth. App. 1, par. 1-3) The Ristows deny this version.

Additionally, the Authority, for the very first time in this litigation, denies that Lloyds of London is the Authority's insurer and identifies a group of insurers as the Authority's carrier. (Auth. App. 1-4) Quite interestingly, the Authority reveals on App. 4 a limit of "US $20,000,000.00." Assuming this correctly identifies policy limits, the possibility of any liability on the Ris-

tows' claim in excess of policy limits appears to be a moot point.

D. REPLY TO RESPONDENT'S UNDERLYING MERITS ARGUMENTS

The Ristows will now reply to those Authority arguments concerning the merits of their case which are believed to require a response. On page 9 of its Brief, the Authority contends that all the basic questions pertaining to Eleventh Amendment immunity favor a finding of immunity for the Authority. The Ristows' discussion in Section III of their Petition shows the Authority is not entitled to immunity.

On pages 10 and 11, the Authority disputes the Ristows' characterization of the Eleventh Amendment's central goal as being to shield state treasuries from federal court judgments. The Authority

claims none of the cases cited by the Ristows make such a statement or holding. In support of their statement concerning the central goal, the Ristows have cited Jacintoport v. Greater Baton Rouge Port Com., 762 F. 2d 435 (5th Cir. 1985), cert. den. 474 U.S. 1057, 106 S. Ct. 797, 88 L. Ed. 2d 774 (1986) Edelman v. Jordan, 415 U.S. 651, 97 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) and Fitchik v. New Jersey Transit Rail Operations Inc., 873 F. 2d 655 (3rd Cir. 1989), cert. den. 493 U. S. 850, 1108, Ct. 148, 107 L. Ed. 2d 107(1989). (Petition, p. 21)

Obviously, the Authority has misread these cases since this goal can easily be discerned from a reading of pages 662 and 663 of the Edelman opinion. When identifying the treasury factor as being the most significant inquiry, the Court

in Fitchik notes "... this conclusion is supported by the Supreme Court's identification of the amendment's central goal as the prevention of federal court judgments that must be paid out of the state's treasury." Fitchik, 873 F. 2d at 659-660. Edelman is cited as support for the foregoing quotation. Jacintoport refers to treasury protection as "one of the most important goals of the immunity of the Eleventh Amendment." Jacintoport, 762 F. 2d at 440. The Amendment's historial purpose of protecting the treasuries of the new States from suits to collect Revolutionary War debts further supports the Ristows' position. See Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, n.1, 79 S.Ct. 785, 3 L. Ed. 2d 804 (1959).

In Section II of its Brief, the Authority discusses the significance of the existence of a state forum for the Ristows' claims. Based upon the authorities they have studied, the Ristows believe the existence or nonexistence of a state forum is not a relevant factor in an Eleventh Amendment analysis. In Section III, Part A, the Authority expresses an expansive view of the state treasury. Sections II and III of the Ristows' Petition discuss the problems with the broad financial view and an expansive definition of the state treasury.

The Ristows agree with the Authority's claim in Section III, Part B, that the purchase of insurance is good business practice. As discussed on pages 39-42 of their Petition, it is also an important component in an actual finan-

cial analysis of whether the state treasury will have to pay a judgment. The Authority claims the Courts in Fitchik, cited earlier, Bolden v. Southeastern Pennsylvania Transportation Authority, 953 F. 2d 807 (3rd Cir. 1991), cert. den. _____ U.S. _____, 112 S. Ct. 2281, 119 L. Ed. 2d 206 (1992), and Royal Caribbean v. Puerto Rico Ports Authority, 973 F. 2d 8 1st Cir. 1992), cited by the Ristows on pages 42 and 43 as support for the importance of insurance coverage, did not consider insurance as a key factor in their decision. While the Courts in these cases commenced their analysis of the tiers of protection by first examining revenues, the presence of insurance was clearly an important factor, particularly in Fitch

ik and Royal Caribbean. See 873 F. 2d at 661 and 973 F. 2d at 11.

In Section III, Part C, the Authority admits there is no continued funding requirement for the Authority, but points out the State's payment on bonds to fund Authority projects. Such payment is purely voluntary, and voluntary payments do not trigger Eleventh Amendment protection as noted on pages 47 and 48 of the Petition.

Finally, in Section III, Part D, the Authority mentions the Fourth Circuit's immunity test and the Court's reliance on decisions of the District Court for South Carolina which have granted immunity to the Authority. The Ristows would direct the Court's attention to Section III of their Petition outlining why this case was wrongly decided and

pages 60-62 discussing the deficiencies of the District of South Carolina's decisions.

CONCLUSION

In their Petition, the Ristows have presented a matter which requires Supreme Court review. The Hess litigation, as discussed in the Supplemental Brief, provides further evidence of the foregoing. The Ristows once again request the Court to grant their Petition for Certiorari and then defer further proceedings until Hess is decided. If such request is not felt to be appropriate, the Ristows then request the Court to defer a decision on whether to grant certiorari in their case pending the outcome in Hess.

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